

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Silver Beach Gardens Corp. :  
AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Corporation :  
Franchise Tax under Article 9A of the Tax Law for :  
the FYE 4/30/80. :  
\_\_\_\_\_ :

State of New York  
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of May, 1983, he served the within notice of Decision by certified mail upon Silver Beach Gardens Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Silver Beach Gardens Corp.  
One Plaza Place  
Bronx, NY 10465

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
27th day of May, 1983.

David Parchuck

William A. Hagellund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Silver Beach Gardens Corp. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
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Franchise Tax under Article 9A of the Tax Law for :  
the FYE 4/30/80. :

State of New York  
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of May, 1983, he served the within notice of Decision by certified mail upon Donald Hulnick the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald Hulnick  
Allen, Litt, Hulnick & Giordano  
15 Neperan Rd.  
Tarrytown, NY 10591

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
27th day of May, 1983.

David Parchuck

William A. Haggard

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

May 27, 1983

Silver Beach Gardens Corp.  
One Plaza Place  
Bronx, NY 10465

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Building #9 State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Donald Hulnick  
Allen, Litt, Hulnick & Giordano  
15 Neperan Rd.  
Tarrytown, NY 10591  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
SILVER BEACH GARDENS CORP.  
for Redetermination of a Deficiency or for  
Refund of Corporation Franchise Tax under  
Article 9-A of the Tax Law for the Fiscal Year  
Ended April 30, 1980.

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DECISION

Petitioner, Silver Beach Gardens Corp., One Plaza Place, Bronx, New York 10465, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal year ended April 30, 1980 (File No. 33687).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 11, 1983 at 9:15 A.M. Petitioner appeared by Allen, Litt, Hulnick & Giordano, Esqs. (Donald Hulnick, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

Whether petitioner qualifies as a cooperative housing corporation, as defined by section 216(b) of the Internal Revenue Code, and thus is entitled to compute its corporation franchise tax by utilizing the rate of tax specified by section 210(1)(a)(2) of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Silver Beach Gardens Corp. ("Silver Beach Gardens"), filed a New York State Corporation Franchise Tax Report (Form CT-4) for the fiscal year ended April 30, 1980, claiming a refund due in the amount of \$2,781.00.

2. By a letter dated April 3, 1981, the Audit Division advised petitioner that the above-claimed refund (as well as a refund claimed for the fiscal year ended April 30, 1979 which is not at issue in this proceeding) was denied. This denial was based on the assertion that Silver Beach Gardens did not qualify as a cooperative housing corporation pursuant to section 216(b) of the Internal Revenue Code.

3. Silver Beach Gardens was incorporated on August 30, 1972 pursuant to section 402 of the New York State Business Corporation Law. An intrastate offering of its stock, limited to the resident owners of certain "bungalows" situated on a spit of land known as Silver Beach, was made by prospectus.

4. Silver Beach sits on a promontory approximately one hundred feet above the East River at its confluence with Long Island Sound (near the Throgs Neck Bridge), and consists of beach front and residence sites.

5. Silver Beach was originally a summer colony of bungalows erected over a period of years commencing with the turn of the century. Some of the bungalows were first built on stilts, but over the course of time all of these bungalows have been filled in or build up and have become "permanent structures". They have basements, are connected to sewer lines, and "...cannot be distinguished from any other house attached to land in the State of New York.". According to testimony, it would be both difficult (and impractical) to remove these structures from their present situs, and to do so would cause severe diminution in their value. These bungalows have been winterized and their owners reside in them as year-round homes.<sup>1</sup>

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<sup>1</sup> The residence structures at Silver Beach are referred to herein as bungalows without prejudice to petitioner's characterization of such structures as permanent homes.

6. Historically, the individual owners of the bungalows each paid a "ground rent" for the lease of the ground upon which their bungalow was situated. This ground rent was originally paid to a partnership which owned the land at Silver Beach. Through this arrangement, the bungalow owners would pay whatever expenses were required for the maintenance of a private system of roads at Silver Beach, as well as other improvements and services used in common such as engineering and plumbing services and overall administrative costs. In addition, a certain portion of the amount of ground rent paid was taken as profit by the partnership.

7. The partnership described above was subsequently incorporated and the bungalow owners continued to pay a charge similar to the ground rent as described above. In addition, the corporation paid the real estate taxes for Silver Beach as assessed by the City of New York and collected reimbursement therefor as a separate charge from each individual bungalow owner.

8. The real estate taxes, although paid as one bill by the corporation as owner of the land, were assessed individually by the City of New York on each site at Silver Beach. Each such assessment contained an assessor's notation differentiating the valuation placed on the bungalow and on the underlying land. However, the petitioner asserts this is the only differentiation, and that the real estate tax is assessed upon both the value of the bungalow and the underlying fee taken together. Thus petitioner asserts the bungalows are considered, at least (and assertedly only) for tax purposes, to be real estate.<sup>2</sup>

9. Petitioner's representative testified that for purposes of transfer of ownership of the bungalows, either by sale or by devise, the bungalows were

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<sup>2</sup> It was noted that there was also a separate assessor's notation made with respect to improvements (roads, sewers, etc.) used in common by the bungalow owners.

treated as personal property and not as real estate. Transfer by sale is accomplished by a bill of sale, and liens are affixed by the filing of Uniform Commercial Code financing statements as used in the financing of fixtures or chattels.

10. The owners of the bungalows were also entitled to "rent control" protections and thus, for purposes of rent control law, the bungalows were treated as component parts of the real estate owned by the corporation.

11. The corporation conveyed only the fee interest (the real property) to petitioner, Silver Beach Gardens. This transfer was by deed and no mention or description of the bungalows was contained in the deed. Taxes on the real property were assessed by the City of New York in the same manner as described in Finding of Fact "8", supra. Silver Beach Gardens pays these taxes through assessment to each bungalow owner.

12. Proprietary leases between petitioner and the individual bungalow owners cover the lease of "property sites" at Silver Beach and establish a scheme of regulations and controls providing inter alia that the bungalows cannot be changed, modified or altered without the permission of Silver Beach Gardens, must be used only for residential purposes, may not be used for professional purposes and may only be held in certain tenure. Under the proprietary leases, the bungalow owners pay a "maintenance fee" (determined by a Board) to petitioner in order that petitioner may pay the bills associated with the operation of the Silver Beach Gardens property. This fee was stated by petitioner to be "intertwined" and incapable of characterization solely as "rent" for use of the land owned by petitioner as opposed to a "maintenance fee" for care of the common areas, amenities, etc. Failure to pay this fee could, under the terms of the proprietary lease, be cause to require the

bungalow owner to remove his bungalow from the land. This situation has never occurred at Silver Beach Gardens.

13. Petitioner asserts that although it owns only the land and not the bungalows inhabited by the individual tenants of the petitioner, it should qualify as a cooperative housing corporation within the meaning of Internal Revenue Code section 216(b) and therefore should be entitled to the appropriate rate of New York State corporate franchise tax imposed against cooperatives. Petitioner points to the historical evolution of the Silver Beach situation, including the manner of the transfer of ownership of the bungalows and the treatment and interpretation of rights attached thereto, as well as the real estate taxing method employed by the City of New York. Petitioner asserts that such facts require this finding of a cooperative and to find otherwise would be inequitable and unjust.

14. The Audit Division asserts, by contrast, that petitioner does not own the bungalows, thus does not comply with section 216(b)(1)(B) of the Internal Revenue Code and is not entitled to compute its New York State corporation franchise tax as a cooperative housing corporation.

#### CONCLUSIONS OF LAW

A. That section 210(1)(a)(2) of the Tax Law provides, in part, that the computation of tax "...in the case of a cooperative housing corporation as defined in the internal revenue code,..." shall be at the applicable rate of four-tenths of a mill (emphasis added) [see also 20 NYCRR 3-1.2(a)(1)(iii)].

B. That section 216(b) of the Internal Revenue Code provides:

"(b) DEFINITIONS. -- For purposes of this section --

(1) COOPERATIVE HOUSING CORPORATION. -- The term 'cooperative housing corporation' means a corporation --

(A) having one and only one class of stock outstanding,



(B) each of the stockholders of which is entitled, solely by reason of his ownership of stock in the corporation, to occupy for dwelling purposes a house or an apartment in a building owned or leased by such corporation,

(C) no stockholder of which is entitled (either conditionally or unconditionally) to receive any distribution not out of earnings and profits of the corporation except on a complete or partial liquidation of the corporation, and

(D) 80 percent or more of the gross income of which for the taxable year in which the taxes and interest described in subsection (a) are paid or incurred is derived from tenant-stockholders." (Emphasis added) [see also 20 NYCRR 3-1.2(b)].

C. That the petitioner owns only the land upon which the bungalows are situated, while the bungalows are owned individually by the stockholders of the corporation. Accordingly, petitioner does not fulfill the requirement that it must own or lease the building(s) which its stockholders are entitled to occupy as specified by section 216(b)(1)(B) of the Internal Revenue Code, and thus petitioner is not entitled to compute its corporation franchise tax by using the rate specified in section 210(1)(a)(2) of the Tax Law.

D. That the petition of Silver Beach Gardens Corp. is hereby denied and the denial of refund dated April 3, 1981 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER